IN THE COURT OF APPEALS OF IOWA

FILED
MAY 25 1982
CLERK SUPREME COURT

IN RE MARRIAGE OF KEVIN WAYNE SHAFER & NANCY ELIZABETH SHAFER

Upon the Petition of)

KEVIN WAYNE SHAFER,)

Petitioner-Appellee,) Filed May 25, 1982

And Concerning) 400

NANCY ELIZABETH SHAFER,) 2-195
3-67443

Respondent-Appellant.

Appeal from Boone District Court - M. D. Seiser, Judge.

Respondent-mother appeals trial court's modification of child custody provisions of 1979 dissolution decree. - REVERSED.

Kirke C. Quinn, of Doran, Doran, Courter & Quinn, Boone, for respondent-appellant.

Stephen M. Terrill, of Maurer, Terrill, Hronek & Dickson, Ames, for petitioner-appellee.

Heard en banc.

PER CURIAM

Respondent Nancy Shafer appeals trial court's modification of the child custody provisions of the parties' 1979 dissolution decree. On appeal she asserts that there was insufficient evidence to support the modification . We review this issue de novo (see Iowa R. App. P. 4) and reverse the trial court's order.

The parties' marriage was dissolved by decree filed on April 2, 1979. Pursuant to a stipulation incorporated into the decree, Nancy was awarded custody of the parties' three minor children, ages eleven, nine and five. Shortly after the dissolution, petitioner Kevin Shafer reenlisted in the navy. He spent a year at sea and is currently stationed in California. At trial there was testimony about his remarriage, future sea-duty schedule, and parenting skills.

Following the dissolution the children have continued to reside in Boone where their mother lives. However, in January 1980, Nancy fell and broke her leg, resulting in complete disability for two months and partial disability for four additional months, with consequent loss of wages. Due to Nancy's financial problems she relinquished physical custody of Steven to her brother Richard in September 1980 and at or about the same time placed physical custody of the other two children, Scott and Stacy, with her sister Barbara. Richard and Barbara each have families with children in Boone. The parties' children have continued to reside with Richard and Barbara. At the time of trial Nancy was working as a beautician during the day and a bartender at night. She nevertheless spends a considerable amount of time with her children. There are no allegations, and no evidence was presented, that the children are not properly cared for in their uncle's and aunt's homes. Nancy testified that she planned to resume full-time care and custody of the children within two months of trial.

The trial court concluded that Kevin's remarriage and the transfer of physical custody of the parties' children to Nancy's relatives constituted a

substantial change in circumstances. The court indicated its belief that the transfer of the children to Nancy's brother and sister would be permanent except for Kevin's modification action. The court ultimately concluded that the children would be better off with Kevin because they would thus be together rather than separated. The trial court also indicated its belief that the children would have a more stable life with Kevin.

Nancy's arguments on appeal are primarily channeled in two directions: (1) that the placement of the children with the uncle and aunt is a temporary situation which was improperly characterized by the trial court as being permanent; and (2) that Kevin's relationship with the children is no longer sufficiently viable nor is his parenting ability sufficiently established to permit a finding that it is in the children's best interest to give him custody. On our de novo review of the evidence we find merit in both of these contentions.

Although no firm timetable has been established for Nancy resuming full custodial responsibility of the parties' children, we nevertheless find and conclude that it is premature to view the present living situation as a permanent change of circumstances so as to justify a modification of the decree. In this regard we view In re Marriage of Dawkins, 285 N.W.2d 8 (Iowa 1979), as being clearly distinguishable on the facts presented. Secondly, unlike the party seeking modification in Dawkins, Kevin's showing concerning his interpersonal relationships with the children and future parenting potential is far too inconclusive to permit a finding that the children will be better off in his custody. In this regard it is well established that in order for changed circumstances to justify modification of a custody decree the evidence must demonstrate or clearly suggest that the new custodial arrangement will better serve the children's well-being. In re Marriage of Brown, 247 N.W. 2d 2, 4 (Iowa 1976).

Because of our differences with the findings and conclusions of the trial

court on these important evidentiary aspects of the present case, we reverse the order for modification and remand the matter to the trial court for an order denying the requested change of custody.

REVERSED.

All judges concur, exception, Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent.

The parties' children had been in the formal custody of their aunt and uncle for over a year when the trial court filed its order modifying custody. A close examination of the record indicates that the respondent was not totally disabled by a broken leg when she turned the children over to the care of their aunt and uncle. This was done approximately eight months after breaking her leg, by which time she should have been capable of caring for them herself.

The trial judge stated, and I am satisfied the record supports his conclusion, that this convenient custody arrangement would have continued indefinitely, but for the filing of petitioner's modification action. Thus, the children would continue to be separated from each other and would only have alternating weekend visitations with their dejure custodial parent while the de facto day-to-day parenting would continue to be provided by their aunt and uncle. Furthermore, I see no assurance that this informal custody situation will terminate on its own. By reversing the trial court's modification of custody, the majority is in effect allowing the children to continue living in separate households with nonparents. Our case law states it is desirable that a natural parent have custody over a nonparent if that natural parent is capable. In re Marriage of Smith, 269 N.W.2d 406 (Iowa 1978). There is no evidence to indicate petitioner is not a capable parent. In fact, the record indicates he has remarried and could provide for the parties' children with a good home under the care and supervision of two adults. I would, therefore, affirm the trial court's award of custody to the petitioner.